

16. Delegating Legislative Power

Contents

The separation of powers	441
Delegating legislative power—a common practice	442
Criticisms	442
Safeguards	443
Constitutional limits	445
Examples of laws that delegate legislative power	445
Justifications for delegating legislative power	447
Conclusions	449

The separation of powers

16.1 Under the constitutional doctrine of the separation of powers, parliaments make laws, the executive administers or enforces laws, and the judiciary adjudicates disputes about the law. The doctrine is reflected in the structure of the *Australian Constitution*: Chapter I is entitled ‘The Parliament’; Chapter II, ‘The Executive Government’; and Chapter III, ‘The Judicature’. But these powers are not as separate and the distinctions not as clear as some might imagine. For one thing, in Australia, members of the executive (the Cabinet and other government ministers) are also members of the legislature.

16.2 Nevertheless, from the separation of powers doctrine may be derived the principle that legislative power should not be inappropriately delegated to the executive. Although it is common for Parliament to delegate the power to make laws to the executive—not only to government ministers, but also government agencies such as the Australian Taxation Office and the Australian Securities and Investments Commission—this chapter is about when this would not be appropriate.

16.3 This chapter is concerned with laws that delegate *legislative* power, rather than with laws that give ministers and government agencies *executive* power. There may be no bright line between legislative and executive power, but the distinction is ‘essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases’.¹ Creating new rules of law of general application is traditionally the role of Parliament.

1 *Minister of Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325, 331.

Delegating legislative power—a common practice

16.4 Delegating legislative power to the executive is now commonplace and is said to be essential for an efficient and effective government. The Public Interest Advocacy Centre submitted that, given ‘the breadth and depth of areas now regulated by government, the ability to flesh out primary legislation in subordinate legislation is a necessary and expedient tool of government’.²

16.5 In fact, parliaments have been delegating powers to the executive for some time—in England, possibly for as long as 650 years.³ A famous example from 1539 is the *Statute of Proclamations*, which included the following provision:

The King for the Time being, with the advice of his Council, or the more Part of them, may set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament.⁴

16.6 In Australia, delegated legislation has been a major part of the law since colonisation.⁵ Indeed, ‘the very first legal step taken by the English to establish a colony—Governor Phillip’s Proclamation at Sydney Cove—could be viewed as a subordinate legislative action’.⁶ Today far more laws are made under delegation than directly by parliaments.

16.7 Not only does the modern state depend on delegated legislation, but it might be argued that parliamentary sovereignty would be limited to some degree if parliament could not choose to delegate part of its legislative power.

Criticisms

16.8 Despite the fact that parliaments commonly delegate legislative power to the executive, and have done so for some time, some laws are more properly made by Parliament. Professor Denise Meyerson has written that although some delegated legislation is clearly necessary in practice, there is a danger:

if we allow the unlimited transfer of legislative power to the executive we run the risk of subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it.⁷

2 Public Interest Advocacy Centre, *Submission 55*.

3 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 5; VCRAC Crabbe, *Legislative Drafting* (Routledge, 2012) 213.

4 The King at the time was Henry VIII. As discussed below, a provision in an Act that allows for delegated laws to amend an Act of Parliament is now known as a ‘Henry VIII clause’. The *Statute of Proclamations* is also known as the *Proclamation by the Crown Act 1539*, 31 HVIII c 8.

5 Pearce and Argument, above n 3, 5.

6 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012) 259.

7 Denise Meyerson, ‘Rethinking the Constitutionality of Delegated Legislation’ (2003) 11 *Australian Journal of Administrative Law* 45, 52.

16.9 Furthermore, the executive has been said to ‘lack the democratic credentials of Parliament’.⁸ The framers of the *Constitution* vested the legislative power in the Australian Parliament ‘because they thought the people’s elected representatives particularly well-suited to the exercise of the “open-ended discretion to choose ends” which is the essence of the legislative task’.⁹

16.10 The fact that the ‘executive process lacks the transparency and publicity of the parliamentary process’ has been said to be an important concern about delegating legislative power.¹⁰ Delegation ‘reduces the accountability of the exercise of legislative power’.¹¹

16.11 Although it is not clearly a right, freedom or privilege, the principle that legislative power should not be inappropriately delegated to the executive may be an important way of protecting other rights, freedoms and privileges. MJC Vile said the separation of powers doctrine—which clearly supports the principle discussed in this chapter—was ‘essential for the establishment and maintenance of political liberty’.¹²

16.12 Sometimes, criticism of delegated legislation concerns its quality and quantity,¹³ rather than whether the law belongs in primary legislation. David Hamer, for example, has said that delegated legislation is a ‘fertile field for government despotism and bossy interference by bureaucrats’.¹⁴ The thrust of the debate about the burden of government regulation, Robin Creyke and John McMillan write, is that

some government regulation has become overly prescriptive, badly designed, poorly administered, inconsistent and duplicative, unduly burdensome, unnecessarily costly to industry, and a barrier to national business competition.¹⁵

16.13 However, this chapter is not about the quality or quantity of delegated legislation, or whether particular delegated laws should have been made at all, but rather about whether particular types of delegated law should more properly have been made directly by parliament.

Safeguards

16.14 Delegated legislation receives less public and parliamentary scrutiny than primary legislation. However, some concerns about delegated legislation may be addressed by the procedures that must be followed in making the legislation,

8 Ibid 53.

9 Ibid.

10 Judith Bannister et al, *Government Accountability* (Cambridge University Press, 2014) 112.

11 Ibid.

12 MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998) 14. Pearce and Argument summarise the primary arguments directed against the use of delegated legislation as: ‘First, that if the executive has power to make laws, the supremacy or sovereignty of parliament will be seriously impaired and the balance of the *Constitution* altered. Second, if laws are made affecting the subjects, it can be argued that they must be submitted to the elected representatives of the people for consideration and approval’: Pearce and Argument, above n 3, 11.

13 The ‘proliferation’ of delegated legislation is discussed in Pearce and Argument, above n 3, 16.

14 David Hamer, ‘Can Responsible Government Survive in Australia?’ (Department of the Senate, 2001) 148 <http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/hamer>.

15 Creyke, McMillan and Smyth, above n 6, 368.

particularly since the enactment of the *Legislative Instruments Act 2003* (Cth). These safeguards are designed to allow Parliament to oversee the making of delegated legislation, to scrutinise it through committees, and to repeal laws that Parliament considers should not have been made.¹⁶

16.15 The practical effect of the *Legislative Instruments Act* was explained in part by the Australian Securities and Investments Commission (ASIC), one of the government agencies that makes delegated legislation. If it makes a legislative instrument, ASIC said, it must not only register the instrument when it is made, but first:

engage in appropriate consultation, ... explain in an Explanatory Statement the justification for making the instrument, the instrument is subject to disallowance (repeal) by either House of Parliament during a disallowance period and the instrument will expire by operation of law after 10 years (unless earlier repealed or earlier ceasing to have effect according to its terms).¹⁷

16.16 The requirement that legislative instruments be published on a public register was a major development made by the *Legislative Instruments Act*, and helps provide for an open and accountable delegated legislation process.¹⁸

16.17 There are also limits on incorporating other instruments or writings in delegated legislation, although this is subject to a contrary intention in the enabling Act.¹⁹

16.18 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) and the Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee) both consider whether an Act of Parliament inappropriately delegates legislative power to the executive.²⁰ The Regulations and Ordinances Committee in particular scrutinises delegated legislation to ensure ‘that it does not contain matter more appropriate for parliamentary enactment’.²¹

16.19 The tabling, disallowance, and committee scrutiny of delegated legislation are important safeguards and practical way for parliament to control executive lawmaking.

16.20 Common law principles may also provide additional safeguards. For example, although a statute may provide for the sub-delegation of legislative power,²² if it does not, a delegate generally cannot sub-delegate the power.²³

16 This is in addition to the judicial review of delegated legislation, which essentially considers whether the legislation was validly made, often whether it is within power.

17 Australian Securities and Investments Commission, *Submission 74*. See *Legislative Instruments Act 2003* (Cth).

18 *Legislative Instruments Act 2003* (Cth) pt 4.

19 *Ibid* s 14.

20 Parliamentary committees are discussed in Ch 2.

21 Senate Standing Order 23(3)(d).

22 ‘I have found no reason for concluding that Parliament may not, in authorizing subordinate legislation, confer power to authorize the making of regulations or by-laws not inconsistent with the legislation which Parliament has directly authorized’: *Esmonds Motors v Commonwealth* (1970) 120 CLR 463, 477 (Menzies J). See also Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 3rd ed, 2005) [23.4].

23 ‘The broad principle that a person cannot, without authority, delegate legislative power that has been delegated has been accepted with only one or two minor expressions of doubt’: *Ibid* [23.5]. Pearce and Argument discuss the question of sub-delegation of delegated legislative power in *Ibid* ch 23.

Constitutional limits

16.21 The *Australian Constitution* does not expressly authorise the Commonwealth Parliament to delegate power to make laws, but nor is it expressly prohibited. The High Court's decisions in *Baxter v Ah Way*²⁴ and *Roche v Kronheimer*²⁵ have been held as authority for Parliament's power to delegate certain legislative powers to the Executive. Dixon J said that *Roche v Kronheimer* decided that

a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the *Constitution* does not operate to restrain the power of the Parliament to make such a law.²⁶

16.22 In *Victorian Stevedoring and General Contracting Company v Dignan*, Dixon J noted the 'logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation'.²⁷

16.23 Dixon J suggested when a delegation of legislative power may not be valid:

This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority.²⁸

16.24 Whether constitutionally valid or not, a 'wide' and 'uncertain' delegation of legislative power may not be appropriate.

Examples of laws that delegate legislative power

16.25 It is quite common for Commonwealth legislation to delegate to the executive the power to make certain laws. There are thousands of legislative instruments currently in force in Australia, covering a wide range of subject matter, including laws about food standards, fisheries, civil aviation, corporations, superannuation, taxation and migration, to name only a few subjects.

24 *Baxter v Ah Way* (1910) 8 CLR 626, 637–8.

25 *Roche v Kronheimer* (1921) 29 CLR 329.

26 *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73, 101.

27 It is 'one thing to adopt and enunciate a basic rule involving a classification and distribution of powers of such an order, and it is another to face and overcome the logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation': *Ibid* 91.

28 *Ibid* 101.

16.26 Acts that delegate legislative power to the executive often do so in terms similar to this provision, from the *Atomic Energy Act 1953* (Cth):

The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.²⁹

16.27 Some provisions like this will set out more fully the types of regulations that may be made. For example, there is considerable detail about what the regulations may do in s 63 of the *Therapeutic Goods Act 1989* (Cth).

16.28 Sometimes a provision in an Act delegating legislative power is expressed broadly and there is little substantive law in the primary legislation. This is sometimes called ‘skeleton’ legislation—the bare bones are in the primary legislation, but most of the law is in the delegated legislation.³⁰ This arrangement has often been criticised.³¹ Pearce and Argument cite the *Carbon Credits (Carbon Framing Initiative) Act 2011* (Cth) and related Acts as an example, although there are many other such Acts.³² The Scrutiny of Bills Committee said in 2012 that ‘framework’ bills were becoming increasingly prevalent³³ and that ‘important information’ should be included in the primary legislation, ‘unless there is a principled reason for including it in delegated legislation’.³⁴

16.29 Offence provisions are considered particularly important, and generally belong in primary legislation, particularly where the penalties for infringement are high. For example, s 30B of the *National Credit Code* allows for the making of certain regulations concerning credit card contracts, including for offences and civil penalties against the regulations.³⁵ Although there are limits in the Act on the offences and penalties, the Scrutiny of Bills Committee said the ‘penalties which may be imposed by regulation are significant and it is unclear why the offences and requirements cannot adequately be specified in the legislation which will be considered in detail by Parliament’.³⁶

16.30 ‘Henry VIII clauses’ are another type of delegation of legislative power that is considered inappropriate.³⁷ These allow delegated legislation to amend the primary

29 *Atomic Energy Act 1953* (Cth) s 65.

30 This is also called ‘coat-hanger’ or ‘framework’ legislation.

31 See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) ch 5; Pearce and Argument, above n 3, 121–123.

32 Pearce and Argument, above n 3, 122.

33 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) 35.

34 *Ibid* 34.

35 *National Consumer Credit Protection Act 2009* (Cth) sch 1 s 30B(2).

36 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 4 of 2011* (2000) 47.

37 The first such clause is quoted earlier in the chapter.

legislation. The Scrutiny of Bills Committee often comments on such provisions. In 2009, for example, the Committee noted the large number of Henry VIII clauses in the National Consumer Credit Protection Bill 2009—so many in fact that it was ‘not possible to provide commentary in relation to all of them’.³⁸ The relevant Minister defended the arrangement, telling the Committee that the Government needed to ensure that there was ‘adequate flexibility in the new arrangements to ensure the smooth transition to a national credit regime’.³⁹ Section 35A of the *Fair Work Act 2009* (Cth), which relates to the geographical application of the Act, is another example of a Henry VIII clause.⁴⁰

16.31 Government agencies and regulators will sometimes be given the power to make delegated legislation. The Commissioner of Taxation and ASIC, for example, both have statutory powers to make certain rules and regulations. For example, under the *Income Tax Assessment Act 1936* (Cth), the Commissioner of Taxation may determine by legislative instrument which taxpayers are required to lodge an income tax return.⁴¹ Under *A New Tax System (Goods and Services Tax) Act 1999* (Cth), the Commissioner of Taxation may make certain determinations in relation to how much GST is payable on taxable importations.⁴² There are many other such examples.

16.32 Only a few submissions to this Inquiry commented on inappropriate delegations of legislative power. The Public Interest Advocacy Centre (PIAC) expressed some concern about the practice, particularly in light of what it saw as ‘minimal parliamentary scrutiny’ in practice.⁴³ Parliamentary committees often highlight potentially problematic delegations, but PIAC submitted that much depends on the ‘individual will of parliamentarians to make themselves aware of the potential impact of tabled delegated legislation’.⁴⁴

16.33 Measures to limit inappropriate delegations of legislative power were also suggested by PIAC. For example, it recommended that legislative instruments be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It also suggested that the *Legislative Instruments Act* be amended to include a non-exhaustive list of powers and matters which should not be delegated, unless there is a public interest in doing so.⁴⁵

Justifications for delegating legislative power

16.34 Practical necessity is perhaps the overriding justification for delegated legislation. The ‘modern state depends on reams of delegated legislation’⁴⁶ and

38 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Tenth Report of 2009* (September 2009) 370.

39 Ibid 371.

40 Bannister et al, above n 10, 116.

41 *Income Tax Assessment Act 1936* (Cth) s 161.

42 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 13–20(3).

43 Public Interest Advocacy Centre, *Submission 55*.

44 Ibid.

45 For PIAC’s other recommendations, see Ibid.

46 George Winterton, *Winterton’s Australian Federal Constitutional Law: Commentary and Materials* (Lawbook Company, 2013) [3.500].

therefore the ability of a legislature to empower others to make legislation has been described as ‘an essential adjunct to the practice of government’.⁴⁷

16.35 Pearce and Argument write that the delegation of legislative power is ‘generally considered to be both legitimate and desirable’ in three situations:

- to save pressure on parliamentary time;
- when the legislation would be too technical or detailed; and
- where the legislation must deal with rapidly changing or uncertain situations.⁴⁸

16.36 ASIC highlighted the need for delegated legislation in the regulation of corporations and financial services. The nature of the laws that it administers, ASIC submitted, is such that ‘it would be impossible for primary legislation dealing with that subject matter to satisfactorily accommodate every circumstance currently known and that may arise in the future’.⁴⁹ ASIC continued:

These sectors of the Australian economy are complex and subject to constant innovation. Without delegated legislative power, primary legislation would be unable to anticipate and respond in a timely way to the challenges and issues raised by these sectors.⁵⁰

16.37 Pearce and Argument write that ‘one of the fundamental justifications for putting something into delegated legislation is that it is something that parliament need not be too concerned about but, rather, is something that the parliament can be relatively comfortable merely keeping a watchful eye over’.⁵¹ In other words,

‘important’ things—including the intrinsically ‘political’ things—are to be kept to the primary legislation. The delegated legislation is for the detail, for the machinery.⁵²

16.38 Further guidance on what are appropriate matters for primary and delegated legislation may be found in the *Legislation Handbook*.⁵³ It states that ‘while it is not possible or desirable to provide a prescriptive list’, the following kinds of matters should be included in primary legislation:

- (a) appropriations of money;
- (b) significant questions of policy including significant new policy or fundamental changes to existing policy;
- (c) rules which have a significant impact on individual rights and liberties;

47 Pearce and Argument, above n 3, 170.

48 Pearce and Argument, above n 9, [1.9]. Similar and other reasons justifying delegated legislation were set out in the ‘Report of the Committee on Ministers’ Powers (Donoughmore Committee)’ (United Kingdom, 1936). See Caroline Morris and Ryan Malone, ‘Regulations Review in the New Zealand Parliament’ (2004) 4 *Macquarie Law Journal* 7, 9.

49 Australian Securities and Investments Commission, *Submission* 74.

50 *Ibid.*

51 Pearce and Argument, above n 3, 118.

52 *Ibid.* 119.

53 Department of Prime Minister and Cabinet Canberra, *Legislation Handbook* (1999). This is a guide to making legislation for government departments.

- (d) provisions imposing obligations on citizens or organisations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);
- (e) provisions conferring enforceable rights on citizens or organisations;
- (f) provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);
- (g) provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court);
- (h) provisions imposing taxes or levies;
- (i) provisions imposing significant fees and charges (equal to more than 50 penalty units consistent with (f) above);
- (j) provisions authorising the borrowing of funds;
- (k) procedural matters that go to the essence of the legislative scheme;
- (l) provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and
- (m) amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is required).⁵⁴

16.39 The proportionality principle, which is useful to test limits on many rights, may be less helpful in determining whether a delegation of legislative power is appropriate. For one thing, applied here, the proportionality principle would suggest that delegations of legislative power should be rare and only made when strictly necessary. However, delegating legislative power to the executive is very common and is a widely accepted method of law making, particularly if subject to parliamentary control.

Conclusions

16.40 This chapter has highlighted some important concerns about laws in delegated legislation that might more properly belong in primary legislation. However, this was not a subject that attracted much comment in submissions to this ALRC Inquiry.

16.41 There are many processes in place to remind law makers about when laws should be in primary rather than delegated legislation. There is guidance in the *Legislation Handbook* and scrutiny by parliamentary committees. There are also procedures that enable either House of Parliament to 'disallow' (repeal) delegated legislation soon after it has passed.

54 Ibid 3.

16.42 These mechanisms may be used to consider whether particular laws should be provided for in primary or delegated legislation. Given the quantity of delegated law in Australia, careful and ongoing scrutiny—built into the process of making delegated legislation—may be the most suitable way to limit inappropriate delegations of legislative power. However, the ALRC invites comment on any particular laws in delegated legislation that would more appropriately belong in primary legislation.